No. 98-33

In The

Supreme Court of the United States

October Term, 1997

SCOTT LYNN CHRISTENSON,

Petitioner,

v.

TONY TURPIN, Warden,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of Georgia

BRIEF IN OPPOSITION ON BEHALF OF RESPONDENT

PAIGE REESE WHITAKER
Counsel of Record for Respondent
Assistant Attorney General

THURBERT E. BAKER
Attorney General

MARY BETH WESTMORELAND
Deputy Attorney General

SUSAN V. BOLEYN
Senior Assistant Attorney General

Please serve:

PAIGE REESE WHITAKER
40 Capitol Square, S.W.
Atlanta, Georgia 30334-1300
(404) 656-5734

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

CAPITAL CASE

QUESTION PRESENTED

I.

Should this Court decline to grant certiorari to review a fact-specific application of the settled precedent of this Court to the particular circumstances of Petitioner's case?

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

STATEMENT OF THE CASE 1

REASONS FOR NOT GRANTING THE WRIT 5

I. THIS COURT SHOULD DECLINE TO GRANT CERTIORARI TO REVIEW A FACT-SPECIFIC APPLICATION OF THE SETTLED PRECEDENT OF THIS COURT TO THE PARTICULAR CIRCUMSTANCES OF PETITIONER'S CASE 5

CONCLUSION 10

TABLE OF AUTHORITIES

Page

CASES

Christenson v. Georgia, 502 U.S. 855, 112 S.Ct. 166 (1991) 2

Christenson v. Georgia, 508 U.S. 927, 113 S.Ct. 2388 (1993) 3

Christenson v. State, 261 Ga. 80, 402 S.E.2d 41 (1991) 2

Christenson v. State, 262 Ga. 638, 423 S.E. 2d 252 (1992) 3

Ross v. Moffitt, 417 U.S. 600, 94 S.Ct. 2437 (1974) ...5, 8

Smith v. Francis, 253 Ga. 782, 325 S.E.2d 362 (1985) 7

Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052 (1984) ..... *passim*

Texas v. Mead, 465 U.S. 1041, 104 S.Ct. 1318 (1984) 5

Turpin v. Christenson, 269 Ga. 226, 497 S.E.2d 216 (1998) 4, 7, 8

United States v. Johnston, 268 U.S. 220, 45 S.Ct. 496 (1924) 5, 9

PART ONE

STATEMENT OF THE CASE

Petitioner, Scott Lynn Christenson, was indicted in the Superior Court of Harris County, Georgia on September 11, 1989 for the July 6, 1989 armed robbery and murder of Albert L. Oliver III. Petitioner was represented at trial by attorneys William L. Kirby II and Richard A. Bunn. Petitioner was tried before a jury in a bifurcated trial conducted March 19, 1990 through March 24, 1990 and was convicted of murder and armed robbery. Petitioner was sentenced to death for murder and to life imprisonment for armed robbery.

Petitioner did not file a motion for new trial. On direct appeal, the Supreme Court of Georgia found the following facts:

> Christenson spent most of the afternoon of July 6, 1989 working out at a gym next door to the victim's place of employment. After his workout, he waited in front of the gym, carrying a gym bag inside of which were two handguns. His parents drove by and asked him if he needed a ride. He answered in the negative. Soon afterward, the victim exited the building next door and went to his four wheel drive Toyota utility vehicle, which contained a several-thousand dollar, competition-quality stereo system big enough to almost completely fill the luggage area of the vehicle. Christenson was acquainted with the victim, and approached him to ask for a ride to a friend's house. Christenson's parents observed him enter the victim's truck and ride off.

> Christenson directed the victim to a remote area of Harris County, and withdrew a gun from his bag. According to Christenson, a struggle for the gun ensued, the truck came to a stop, the passenger door fell open, and the two men fell out to the ground. Christenson gained control of the gun and shot the victim five times. Then he stuffed the victim's body into the passenger side of the truck, drove off the highway 100 yards, and left the body, covered with sticks and brush. He drove the victim's truck to Arkansas where he was arrested the next day for stealing gasoline. He called home to ask his father for money to post his bond. His father contacted the local police, who called Arkansas and informed them the truck was stolen and its owner missing. The defendant was interrogated in Arkansas and admitted the truck was stolen, although he denied stealing it. After the victim's body was recovered, the defendant admitted stealing the truck and shooting its owner.

Christenson v. State, 261 Ga. 80, 81, 402 S.E.2d 41 (1991).

The Supreme Court of Georgia affirmed Petitioner's convictions and his life sentence on direct appeal and remanded the death sentence to the trial court for further proceedings on two sentencing phase evidentiary issues. *Christenson*, 261 Ga. 80. That court denied Petitioner's motion for reconsideration on March 27, 1991, *id.*, and this Court denied his petition for writ of certiorari on October 7, 1991. *Christenson v. Georgia*, 502 U.S. 855, 112 S.Ct. 166 (1991). Following remand hearings, the Superior Court of Harris County entered an order upholding Petitioner's death sentence on the two sentencing phase issues before it on remand, and on December 2, 1992, the

Supreme Court of Georgia affirmed the lower court's findings of fact and conclusions of law on remand and affirmed Petitioner's death sentence. *Christenson v. State*, 262 Ga. 638, 423 S.E. 2d 252 (1992). The Supreme Court of Georgia denied Petitioner's motion for reconsideration on December 17, 1992, *id.*, and this Court denied his petition for writ of certiorari on May 13, 1993. *Christenson v. Georgia*, 508 U.S. 927, 113 S.Ct. 2388 (1993).

Petitioner then filed his petition for writ of habeas corpus in the Superior Court of Butts County on or about October 31, 1995. Respondent filed responsive pleadings on or about November 8, 1996. Petitioner's amended petition was filed on or about May 3, 1996, and following the filing of further responsive pleadings, an evidentiary hearing was conducted in this matter on June 4, 5, and 6, 1996 and on June 18, 1996.

On April 14, 1997, the habeas corpus court entered an order granting Petitioner's application for writ of habeas corpus as to the death sentence and vacating the death sentence. The habeas corpus court based its grant of habeas corpus relief on the ground of ineffective assistance of counsel which the habeas court found rendered the sentencing phase of trial unreliable. The habeas court ruled that counsel performed unreasonably throughout trial but concluded that counsels' performance resulted in prejudice to Petitioner only at the sentencing phase of trial, finding that Petitioner did not meet the prejudice prong of *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052 (1984), with regard to the guilt/innocence phase of trial. Respondent appealed from the habeas corpus court's order finding ineffective assistance of counsel and

granting habeas corpus relief as to Petitioner's death sentence.

Petitioner cross-appealed, asserting error in the portions of the habeas corpus court's order adverse to him and in the failure of the habeas court to find that Petitioner suffered prejudice at the guilt/innocence phase of trial from what the habeas corpus court had found to be counsels' unreasonable performance and to grant Petitioner a new trial as to guilt/innocence as well as sentencing.

The Supreme Court of Georgia affirmed the habeas corpus court's finding of ineffective assistance of counsel resulting in prejudice to Petitioner at the sentencing phase of trial and the resulting grant of habeas corpus relief as to the sentencing phase of trial. The Court also affirmed the habeas corpus court's finding that Petitioner did not meet the prejudice prong of *Strickland v. Washington* with regard to the guilt/innocence phase of trial, ruling that the evidence of Petitioner's guilt was "overwhelming." *Turpin v. Christenson*, 269 Ga. 226, 497 S.E.2d 216 (1998). On April 1, 1998, the Supreme Court of Georgia denied motions for reconsideration filed by Respondent as Appellant and by Petitioner as Cross-Appellant. *Id.*; Appendix to Petitioner's Brief, A. 26 and A. 27.

Petitioner has now filed the instant petition seeking review of the decision of the Supreme Court of Georgia applying this Court's well-established precedent, set forth in *Strickland v. Washington*, 466 U.S. 668, to the specific facts of Petitioner's case and concluding on those specific facts that Petitioner failed to satisfy the prejudice prong of the *Strickland v. Washington* analysis so as to

establish ineffective assistance of counsel at the guilt/innocence phase of his trial and to secure guilt/innocence phase habeas corpus relief thereon.

PART TWO

REASONS FOR NOT GRANTING THE WRIT

I. THIS COURT SHOULD DECLINE TO GRANT CERTIORARI TO REVIEW A FACT-SPECIFIC APPLICATION OF THE SETTLED PRECEDENT OF THIS COURT TO THE PARTICULAR CIRCUMSTANCES OF PETITIONER'S CASE.

This Court has repeatedly held that it will not exercise its certiorari jurisdiction merely to review a decision of a state court turning upon an analysis of the particular facts involved. *See, e.g., Ross v. Moffitt*, 417 U.S. 600, 94 S.Ct. 2437 (1974); *Texas v. Mead*, 465 U.S. 1041, 104 S.Ct. 1318 (1984); *United States v. Johnston*, 268 U.S. 220, 45 S.Ct. 496 (1924). Respondent submits that it is precisely this type of decision which Petitioner now asks this Court to grant certiorari to review.

The decision of the Supreme Court of Georgia which Petitioner asks this Court to review applied the clear legal precedent of this Court as contained in its decision in *Strickland v. Washington*, 466 U.S. 668, to the specific facts of Petitioner's case. In reviewing the facts of Petitioner's case and Petitioner's claim of ineffective assistance of counsel, the Supreme Court of Georgia set forth the applicable precedent to be applied to Petitioner's claim as follows:

A claim of ineffective assistance of counsel is grounded in the general right to counsel guaranteed to criminal defendants by the Sixth Amendment to the United States Constitution and Article I, Section I of the Georgia Constitution. Appellate courts apply a two-pronged test to determine if counsel's [sic] performance was ineffective as to require reversal of a conviction or a death sentence:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires a showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.

Strickland v. Washington, supra at 687. The Supreme Court of Georgia adopted the *Strickland* test in *Smith v. Francis*, 253 Ga. 782, 325 S.E.2d 362 (1985). For Christenson to show that his trial counsel's (sic) performance was defective, he must demonstrate that his trial counsel's (sic) performance was not reasonably effective in light of the circumstances confronting his counsel before and during the trial. *Smith*, supra at (1). Hindsight is not employed, and Christenson's counsel is afforded a strong presumption

> that their conduct fell within a wide range of reasonable professional conduct and that their significant decisions were made in the exercise of reasonable professional judgment. Id. In order to show prejudice, Christenson must demonstrate that "there is a reasonable probability (i.e., a probability sufficient to undermine confidence in the outcome) that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. Christenson must show both defective representation and prejudice in order to prevail on this claim.

Turpin v. Christenson, 269 Ga. at 231-232.

In reviewing the specific facts of Petitioner's case and applying this Court's precedent set forth in *Strickland v. Washington*, 466 U.S. 668, and adopted by the Supreme Court of Georgia in *Smith v. Francis*, 253 Ga. 782, the Supreme Court of Georgia held as follows:

> Pretermitting the question of defective representation in the guilt/innocence phase, we find the habeas court did not err by ruling that Christenson cannot meet the prejudice prong of *Strickland*. Although Christenson's counsel's (sic) preparation for and conduct of the guilt/innocence phase included errors and omissions, the evidence of Christenson's guilt was overwhelming. The jury heard, read and saw Christenson admit to killing Oliver in several separate statements, all later held to be admissible by this Court. *Christenson I*, supra at (3). Christenson was the last person seen with Oliver, and Christenson was arrested the following day driving Oliver's truck in another state. There was blood in the truck and on Christenson's clothes. Christenson cannot show that there was a reasonable

> probability that, but for trial counsel's (sic) errors, he would not have been convicted. See *Strickland*, supra; *Smith*, supra. We therefore affirm the habeas court's ruling on Christenson's convictions.

Id. at 233-234 (footnote omitted).

Respondent submits that the Supreme Court of Georgia fully considered and correctly decided the issues now presented by Petitioner and that the decision of the Supreme Court of Georgia on the issue of ineffective assistance of counsel and the question whether Petitioner established prejudice as to the guilt/innocence phase of Petitioner's trial represents no departure from or expansion of this Court's clear guidance for determining such issues set forth in *Strickland v. Washington*, 466 U.S. 668, but rather is merely an application of the legal principles set forth by this Court in that decision to the specific facts of Petitioner's case. Thus, this Court should decline to grant certiorari.

This Court should decline to exercise its certiorari jurisdiction in cases such as Petitioner's in which the petitioner simply asks this Court to review whether the lower court erroneously determined that the facts of his particular case failed to satisfy both prongs of the test for ineffective assistance of counsel set forth by this Court in *Strickland v. Washington*, 466 U.S. 668. As this Court has instructed, "This Court's review . . . is discretionary and depends on numerous factors other than the perceived correctness of the judgment we are asked to review." *Ross v. Moffitt*, 417 U.S. at 617. Thus, a claim such as Petitioner's that the Supreme Court of Georgia's decision was

"incorrect" is insufficient to motivate the exercise of this Court's certiorari jurisdiction.

Petitioner's case presents no question of paramount importance or widespread application, nor is it a case of first impression for this Court's review. Instead, Petitioner seeks to invoke the certiorari jurisdiction of this Court to review the mere application of this Court's settled legal precedent, set forth in *Strickland v. Washington*, 466 U.S. 688, to the particular facts of Petitioner's case.

While Respondent maintains that the Supreme Court of Georgia correctly applied this Court's legal precedent to the facts of Petitioner's case in holding that Petitioner failed to establish the prejudice prong of the ineffective assistance of counsel analysis with regard to the guilt/innocence phase of Petitioner's trial, this Court does not in any event operate simply to correct errors in fact-finding made by lower courts. As this Court stated in *United States v. Johnston*, 268 U.S. at 227, "We do not grant a certiorari to review evidence and to discuss specific facts." Under these circumstances, there is no legitimate basis warranting this Court's grant of certiorari in this matter.

CONCLUSION

WHEREFORE, for all the above and foregoing reasons, Respondent prays that this Court deny this petition for a writ of certiorari as Petitioner merely seeks review of a fact-specific application of the settled legal precedent of this Court.

Respectfully submitted,

PAIGE REESE WHITAKER 598190
Counsel of Record for Respondent
Assistant Attorney General

THURBERT E. BAKER 033887
Attorney General

MARY BETH WESTMORELAND 750150
Deputy Attorney General

SUSAN V. BOLEYN 065850
Senior Assistant Attorney General

Please serve:

PAIGE REESE WHITAKER
40 Capitol Square, S.W.
Atlanta, Georgia 30334-1300
(404) 656-5734